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No. 93-1340

In the Supreme Court of the United States
October Term 1993

United States of America, Petitioner

v.

Gary Mezzanatto, Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE AND THE BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT

National Association of Criminal Defense Lawyers
California Attorneys for Criminal Justice

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APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT BY THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE

The National Association of Criminal Defense Lawyers and the California Attorneys for Criminal Justice request the Court leave to file the amicus brief in support of respondent pursuant to Rule 37.4. The National Association of Criminal Defense Lawyers is a national organization composed of public and private criminal defense lawyers whose work emphasis is in the area of federal criminal defense.

The California Attorneys for Criminal Justice (CACJ) is the second largest criminal defense organization in the country. CACJ is a California non-profit organization with approximately 2,700 dues paying members, primarily criminal defense lawyers, both public and private, who appear regularly in the state and federal courts.

Previously, the amici had garnered permission to file an amicus brief in support of the respondent from both the Solicitor as well as the respondent. (See footnote one to the amicus brief, and the copy of the consent from the Solicitor.) However, just prior to our filing this brief, the respondent informs us that he has withdrawn his previously given consent, thus necessitating this motion for leave to file the brief.

Respondent objects to our including within our brief an important issue we believe inherent in the

question presented by the case, that is, whether the record reflects any "waiver" of rights by the respondent prior to or during the pre-trial settlement discussions. The amici believe that if the Court were to find that such "waivers" are permissible prior to a settlement conference, then no discussion of the question presented could ensue without both analyzing the nature of admonitions and waiver required as well as whether such waiver is supported in this record.

Respondent does not wish this issue presented to the Court, resulting in his withdrawal of consent to file the attached brief on his behalf. We strongly believe the issue we raise concerning respondent's non-waiver of rights supports respondent and in no way detracts from his other arguments.

That this issue must be confronted in any analysis of the question in this case is manifest. Indeed, because this record contains nothing approaching a waiver of rights,[1] the Court may elect to dismiss this case as improvidently granted because the record will not support addressing, except as an advisory opinion, the merits of the question presented. See **Monrosa v. Carbon Black, Inc.,** 359 U.S. 180, 184 (1959).

As we explain in our brief (pp. 27-30), the Government has the burden to show that a waiver of rights was made by respondent prior to the settlement conference and that it was knowing, intelligent and

[1] "'[C]ourts indulge every reasonable presumption against waiver' of fundamental constitutional rights.'" **Carnley v. Cochran,** 369 U.S. 506, 514 (1962); quoting from **Johnson v. Zerbst,** 304 U.S. 458, 464-465 (1938).

voluntary. **Town of Newton v. Rumery**, 480 U.S. 386, 397-398, 399 (1987). Yet, the trial record shows only that respondent and the one agent to the settlement interview testified concerning this issue. Nothing respondent testified to could in the least support either an understanding of the dangers of making statements, the constitutional rights which were being sacrificed, or any knowing and intelligent waiver of those rights.

The Government agent merely testified that the prosecutor told respondent at the start of the meeting that if respondent took the stand at trial anything that he might say at the meeting could be "brought up in a trial setting." J.A. 97. The agent also testified that respondent was told that if respondent lied, he would be charged with false statements. He was told of some Kastigar matter of which the agent did not recall the details. J.A. 96-97. The agent then moved on to recite what statements respondent made about the drugs charges. J.A. 97.

Nothing in the agents' trial testimony shows that the respondent either received proper warnings, understood those warnings or knowingly waived them. A mere admonishment is not a waiver. J.A. 83.

Because the record shows no proper admonition, or waiver or affirmative agreement to the conditions of the meeting, this Court has no "waiver" issue to assess. Cf., **Boykin v. Alabama,** 395 U.S. 238 (1969) (courts cannot assume from a silent record that a guilty plea had been voluntarily made or that constitutional rights have been freely and intelligently waived).

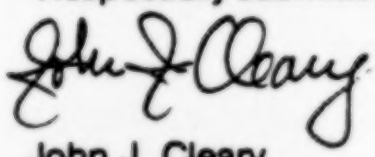
As we note in our brief, the waiver issue in this

context is particularly delicate given the dramatic imbalance of power in the negotiations, the ex parte nature of the discussions, and the unilateral post-conference power of the prosecution to inform the defendant that the Government deems his previously-made statements false with the consequence that the statements given may now be used as evidence against him.

Assuming as a matter of policy this Court permits "waivers" in settlement negotiations, given the noted power imbalance, the ambiguity and the informal (i.e., non-reported) nature of these conferences, any "waiver" must be unequivocally clear and with full disclosure of fact that the defendant may well be incriminating himself without the slightest guarantee that his statements will not be used against him later at a trial.

Unless this brief is filed, an important issue contained within the question presented may go unaddressed by the parties. We ask leave to file the attached brief.

Respectfully submitted,



DATED: July 1, 1994

John J. Cleary
for the amici
Member of Supreme Court Bar

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INTEREST OF THE AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers is the national organization of public and private criminal defense lawyers with emphasis on federal criminal practice.[2] The California Attorneys for Criminal Justice (CACJ[3]) is the second largest criminal defense organization in the country.

Both organizations are concerned about the forced waiver of the defendant's rights as an incident of plea bargaining in the federal courts. Given the shift of sentencing power to the prosecutor under the Sentencing Guidelines, the amici are concerned about the ability of the Government to extract informal "waivers" of constitutional rights at the outset of a prosecution in settlement negotiations. This situations is so fraught with the potential for abuse, it is why, as a matter of public policy, Congress prohibited the evidentiary use of statements made during settlement discussions.

Today in federal plea bargaining, the Sentencing Reform Act of 1984 and draconian minimum mandatory sentences force the accused federal defendant to con-

[1] Letters of consent to file this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

[2] This 34-year-old District of Columbia non-profit corporation has a membership of 8,000 lawyers and 28,000 affiliate members. It is an affiliate of the American Bar Association.

[3] CACJ is a California non-profit organization with approximately 2,700 dues paying members, primarily criminal defense lawyers, both public and private, who appear regularly in the state and federal courts.

sider and enter into settlement negotiations. This is so even for the innocent. **North Carolina v. Alford**, 400 U.S. 25 (1970). Such "settlement negotiations" currently take place on a non-level playing field, in which the federal prosecutor determines the sentence. Only prosecution-approved "cooperation"[4] will be the basis for the award of a sentence less than statutory minimum mandatories or a basis for a downward departure. The prosecution's conditioning participation in settlement on waiver of basic rights provides neither a voluntary waiver nor free consent.

In this case, the record shows no attempt by the Government to fulfill its burden to show waiver of constitutional or statutory rights by respondent. If the Government is to be deemed able to extract and use at trial evidence garnered in settlement discussions, the waiver of constitutional and statutory rights must be explicit. It does not exist in this case.

Approximately 90 per cent of all federal criminal cases are resolved by pleas of guilty. The settlement process is not one of choice. Because defense counsel must explore the options to litigation, rules established by Congress protect this process from exploitation. In any negotiation, much is unknown, and there may be misunderstandings in need of clarification and re-evaluations based on proffers. To work, the process has to foster an atmosphere of open-ended "give-and-take." The

[4] Even if a defendant provides "substantial assistance" in cooperation against another, the prosecutor need not make the requisite motion (18 U.S.C. 3553(e)) to permit the court to impose a sentence less than the Guidelines or the minimum mandatory. **Wade v. United States**, 112 S.Ct. 1840 (1992).

"negotiation" cannot be converted into a device for an extended interrogation by the prosecution agents in order to obtain information for use at trial. To entice a defendant into settlement discussions which serve as a battleground for an eventual evidentiary ambush at trial, makes the defendant a compelled adverse witness against himself in violation of the Fifth Amendment.

Further, basic due process and equality of negotiation position cannot be waiveable without making the process completely unfair. The Ninth Circuit majority opinion was correct as a matter of law and policy, a policy dictated by Congress in the promulgation of the Rules.[5] Those Rules create a fair balance in the negotiation process and so encourage settlement.

ADDITIONAL CONSTITUTIONAL PROVISIONS:

Fifth Amendment: . . . "nor shall [any person] be compelled in a criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . . .

[5] The two rules, Fed. R. Crim. Proc. 11(e)(6) and Fed. R. Evid. 410, were promulgated by Congress under its constitutional authority to constitute tribunals inferior to this Court (Article I, Section 8, clause 9) and the "necessary and proper" clause. The district court criminal and evidentiary rules announced by this Court are the creatures of Congressional mandate and are subject to the overview and revision of Congress. 28 U.S.C. 2072, 2073. The Congressional primacy to legislate procedure in the district court, which includes settlement proceedings, should not be eroded by an analogy to this Court's primacy in the interpretation of the rights of individuals under the Constitution. E. Cleary, Preliminary Notes on Reading the Rules of Evidence, 57 **Neb. L. Rev.** 908, 910 (1978).

Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

Supplemental Statement of Facts[6]

The attorney who represented respondent at the pre-trial post-indictment interview was not the same attorney who represented him at trial. J.A. 40.

Trial Testimony

At trial the respondent, an unemployed electrician, testified in his own behalf. J.A. 14-38, 14-15. Respondent was hired by Gordon Shuster to do some electrical work and became his on-call handyman. J.A. 19-20. Shuster told respondent he was a shipbuilder and a special agent for the CIA who made plastic explosives.[7]

[6] An amplified statement of the facts setting forth the order of evidence at trial is necessary to demonstrate that the "settlement interview" was not for a resolution of the case or the exploration of the "substantial assistance in the investigation or prosecution of another person," but a planned interrogation that could be successfully exploited at trial pitting the agent's recollection of the events against that of respondent.

[7] The court sustained the prosecution's objection, on relevancy grounds, to the presentation of defense witnesses Bernard and Lorene Cook, who would have testified that Shuster had also told them that he was making explosives on his property. J.A. 86-90, 92-94. The statements were not offered for the truth of the matter, but to corroborate the challenged statement of the respondent that he believed Shuster's operation involved explosives, not drugs.

Respondent testified that on the day of his arrest, 1 August 1991, he had a pager that Shuster had instructed him to buy so he could be contacted for work. J.A. 29. Shuster advised him not to have it registered in his own name because of their connection, and respondent later wrote to the pager company giving them the name of a fictitious purchaser. J.A. 31.

On 1 August 1991, respondent answered a page from Shuster who asked him to bring him a sealed and stapled brown mailer package that Shuster had given respondent the day before. J.A. 29-32. He was reluctant to comply because of a prior commitment, but agreed when Shuster offered him $1,300 for the delivery. J.A. 32-34. Respondent met Shuster, who had been arrested earlier that day, at a restaurant. Shuster was now acting as an informant for the agents. An undercover officer, posing as Shuster's friend, was also there. J.A. 34-35, 36. Shuster asked him if he had the stuff. Respondent said the package was in his car. J.A. 35. Shuster suggested that they check out the stuff. J.A. 36. The officer stated, "Stuff looks real good and clean," apparently to Shuster. J.A. 37. Respondent, referring to a glass pipe in the ashtray, not the package, asked them if they wanted a hit. J.A. 37. Respondent denied the testimony of the agent who previously testified that respondent was trying to get them to test the contents of the package or that he wanted money to get another pound of drugs. J.A. 38.

One third of the cross-examination of the respondent by the prosecutor focused on his interview of respondent in the U. S. Attorney's Office before trial. (Total cross: 36 pages. J.A. 38-73. Cross as to interview: 12 pages. J.A. 39-44, 61-67.) At the outset of cross-examination, the prosecutor inquired about respondent's

meeting with two agents and himself. J.A. 39-40. Respondent stated that at the meeting he knew that Shuster and Uncle Bob were trafficking in methamphetamine and that he picked up the package of methamphetamine on the day of the arrest from Uncle Bob. J.A. 41-42. When asked whether he stated the package contained methamphetamine, he testified he was unaware of it at the time he delivered it. J.A. 42. He denied telling the prosecutor that he dealt in ounce quantities of methamphetamine prior to his arrest, but testified that he had told them that the largest amount he had known to be in transactions were ounces. J.A. 43. During the interview he stated that although he never dealt in methamphetamine, he previously had smoked it. J.A. 44.

Redirect examination of the respondent was devoted almost entirely to the interview with the prosecutor and the agents.[8] J.A. 74-83. During the meeting, one of the agents corrected the respondent's error in thinking he was facing a minimum mandatory five-year sentence. Rather, he told respondent it was a ten-year minimum mandatory, and he offered two years of a reduced sentence for coming in for the debriefing. J.A. 77. Respondent was told by the prosecutor "that the Government was the only person – that could refrain from the

[8] Respondent testified he spent five minutes with his lawyer discussing the purpose of the meeting. J.A. 74. The attorney explained that the meeting's purpose was to reduce his sentence (J.A. 75), and told him that the Guidelines dictated a five-year minimum mandatory sentence. J.A. 76.

sentencing guidelines, the judge had no control over it."[9] J.A. 78-79. The atmosphere of the settlement interview was "intimidating [and] unfriendly." J.A. 79. One agent called him a liar and accused him of lying about picking up the package from Uncle Bob, and respondent admitted that statement was false at the interview. J.A. 80-81. According to respondent, the prosecutor terminated the interview. J.A. 81. Respondent, in his last answer on re-direct, testified that on the day of his arrest he did not know what the package contained.[10] J.A 83.

In rebuttal, the Government called Agent Moreland,

[9] A different district court judge substituted different counsel for the one who attended the interview. One of the reasons for the substitution was counsel's misunderstanding of the minimum mandatory sentence. 22 Oct 91 R.T. 2-3, 6-9. This judge confirmed at a court hearing what the prosecutor told respondent – that only the Government could influence the amount of the sentence: "First of all, the reason you have plea bargaining is because the Government is in a position to manipulate under the Guidelines what the sentence – what the sentence can be. . . . And even then the Government is the only one who can manipulate the 10-year period; the court can't do it under the Guidelines. Only under a 5K1.1 can the Government manipulate the mandatory minimum. That's all there is to it." 22 Oct 91 R.T. 9; J.A. 79.

[10] On recross, the prosecutor asked if respondent was given an opportunity to tell what occurred on 1 August. Respondent testified that he was only permitted to answer questions. J.A. 84. Respondent recalled that the agents accused him of lying, but he did not remember doing so. J.A. 84. Respondent was given an opportunity to speak with his attorney during the meeting. J.A. 86. Respondent denied saying during the interview that he knew Shuster was manufacturing methamphetamine prior to 1 August. J.A. 86.

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who had been present at the interview.[11] J.A. 95-106. The agent testified that respondent and his attorney had requested a meeting and wanted to cooperate with the Government in the hopes of receiving some consideration at sentencing.[12] J.A. 96. The meeting lasted 15, 20 minutes, total. J.A. 96. Respondent was told that he had to provide information, that he had to be truthful, that he could be subject to being charged with false statements, that if he told one thing at one time and something contradictory at a later time, that could be brought up in a trial setting, that if he pleaded guilty, he would receive some consideration for any truthful information, that if any information he supplied could be used at a later date he would be given consideration, and some reference about a Kastigar meeting.[13] J.A. 96-97. According to Agent Moreland, the prosecutor also told the respondent: "that none of the information would be used against him in [the] case in chief, only if he lied and took the stand." J.A. 97.

Respondent denied being apprised of the waiver permitting his statements to be used for impeachment purposes. The agent testified only as to the admonition of the conditions of the interview, but never inquired whether respondent understood those conditions or waived any rights.[14]

Agent Moreland testified that during the interview respondent started by telling him he had only dealt ounce quantities prior to the meeting on 1 August. J.A. 97. He admitted knowing the package contained methamphetamine, but said that this was the first time he ever dealt a pound of methamphetamine. J.A. 98. Respondent stated that he had obtained the pound from Uncle Bob and did not know anything about the manufacturing.

[11] After this witness testified, respondent's attorney asked to call the prosecutor as witness to the interview. The court denied the request because he was the lawyer [for the Government] in the case. J.A. 106. This right of compulsory process of a material witness was violated and is an issue that in the future will have to be resolved. If prosecutors obtain these statements in a settlement negotiation and plan to use them at trial, they would obviously be a material witness subject to call by the defense. If so, then the case must be handed off to another prosecutor to avoid the trial attorney being called as a witness. **United States v. Prantil,** 756 F.2d 759 (9th Cir. 1985).

[12] Section 3553(e) of Title 18 provides: "Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense."

Section 5K1.1 of the Sentencing Guidelines provides: "Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines." See **Wade v. United States**, 112 S.Ct. 1840, 1843 (1992).

[13] The prosecutor had earlier stated to the judge: "And, third, we made it very clear to the attorneys present that we not go through a Kastigar hearing, that we would make derivative use of any evidence he provided us, which essentially was nothing." J.A. 91. The reference appears to be to **Kastigar v. United States**, 406 U.S. 441 (1972), which held that statutory use and derivative use immunity was coextensive with the privilege against self-incrimination. This additional settlement waiver appears to permit the Government to derivatively use evidence obtained in violation of the privilege against self-incrimination.

[14] The facts and analysis of the failure of the waiver are set forth under the last argument heading.

Moreland testified that the agents thought respondent was lying and confronted him. J.A. 98. They asked respondent if his fingerprints were on any of the glassware found at Shuster's property, and he admitted that he handled some of the glassware, helped set it up, and knew it was a methamphetamine lab.[15] J.A. 98-99. During the interview, respondent made no mention of the CIA. J.A. 100.

ARGUMENT

Congress Established A "Free Zone" In Settlement Negotiations

In 1972, the proposed Federal Rules of Evidence contained a provision on the inadmissibility of settlement discussions in a criminal case. Rule 410,[16] established a policy to encourage and protect settlement negotiations to achieve resolution through compromise, "give and take," of the majority of cases without formal time-consuming litigation.[17] The Senate Report adopted a more limited Government position that statements made in

[15] The agent who made a report of the interview made no mention of the question about fingerprints or respondent's alleged admissions about the methamphetamine lab. J.A. 101. When the agent made the statement about the respondent's fingerprints on the glass, he had no knowledge of the results of any such test. J.A. 102-3.

[16] Rule 410 is set forth in Petitioner's Brief, Appendix 1a-2a.

[17] See Notes of the Advisory Committee on 1972 Proposed Rules (West 1994 Federal Criminal Code and Rules 231): "As with compromise offers generally, Rule 408, free communication is needed, and security against having an offer of compromise or related statement admitted in evidence effectively discourages it."

settlement agreements could be used for impeachment purposes,[18] as well as a prosecution for perjury, (No. 93-1277), 1974 Cong. & Admin. News 7057-7058. By contrast, the House Report would have precluded their use. The Conference Committee adopted the Senate provision allowing a prosecution for perjury but only under the most restrictive setting in which the statement is made on the record, under oath, and with counsel. It deferred implementation of this rule until the review and adoption of Federal Rule of Criminal Procedure 11 (e)(6).[19] In 1979 Congress clarified Rule 11(e)(6) and Rule 410 by limiting the application of the rule to settlement negotiations with prosecutors, thereby expressly making it inapplicable to negotiations with agents. The Note to the 1979 amendment stated "this history shows the purpose of Fed. R. Evid. 410 and Fed. R. Crim. P. 11(e)(6) is to permit the unrestrained candor which produces effective plea discussions" between the

[18] The Government's position before Congress was a far more limited impeachment request. As stated by Assistant Attorney General W. Vincent Rakestraw: "While we agree that conversations occurring during informal plea discussions should not be admissible in evidence, we believe that statements made by a defendant voluntarily and in open court during the course of the actual plea, with the advice of counsel, should be admissible, at least to impeach the defendant if he subsequently attempts to withdraw his plea and take the stand in his own behalf at trial. Hearing before Subcommittee on Criminal Justice of the Comm. on the Judiciary, House of Representatives (17 Sep 74) 44. [Emph. added.] See also similar comments of then U.S. Attorney for the District of Columbia. Ibid, 78. This position appears reasonable, for it insures judicial supervision and the requirement of voluntariness.

[19] This rule is set forth in Petitioner's Brief, Appendix 2a-3a.

parties.[20] The Committee noted, "Moreover, by relating the statements to 'plea discussions' rather than 'an offer to plead,' the amendment ensures 'that even an attempt to open plea bargaining [is] covered under the same rule of inadmissibility.' **United States v. Brooks**, 536 F.2d 1137 (6th Cir. 1976)." The 1979 amendment then added a second exception "to the general rule of nonadmissibility": if part of the plea discussions are properly before the court, then the remaining plea discussions may be admissible.[21]

In summary, as a general rule, settlement negotiations between the Government and the accused are inadmissible. Congress specifically rejected the use of the Senate's proposal that such settlement negotiations could be used to impeach the defendant.[22] The legislative policy is clear and unequivocal.[23] Except for two specified, narrow exceptions, settlement discussions concerning issues of facts, assessment of witnesses, anticipated legal rulings, probable outcome of the case (a fact determination made by the jury), and possible sentence, are inadmissible. Congress has made a fundamental policy determination and expressly rejected the exception for the purposes of impeachment of a defendant at the time of trial.

Prosecutorial Primacy in Federal Sentencing: the Motion to Depart for Substantial Assistance

Although Congress did not grant prosecutors the right of impeachment of defendants with their settlement statements, Congress has dramatically increased the power of prosecutors over sentencing. Prior to 1 November 1987, the effective date of the Sentencing Reform Act of 1984, federal sentencing had a system of checks and balances. The prosecutor, with the unlimited discretion to charge offenses, could set the maximum penalty for the misconduct. The prosecutor could recommend a specific sentence to the court,[24] and in 90% of the cases that recommendation was not exceeded by the judges and most often followed by them. Under pre-Guidelines law, the judge had unfettered discretion up to the statutory maximum, but had begun to use the Parole Guidelines,

[20] 1994 Federal Criminal Code and Rules (West) 48.

[21] Ibid, 49.

[22] Settlement negotiations must be fair and, equally important, be perceived as fair. If petitioner prevails in its position, the bargaining process will be turned into a process for the accumulation of devastating trial evidence. Both sides at the settlement table, armed with tape recorders, will be waiting for the other to make some tactical blunder that could be used at trial. It would difficult to call this a negotiating atmosphere. Will a defendant be able to use at trial statements made by the agents or the prosecutors during negotiations to show inconsistencies of position or weakness in the case? **Compare Bruno v. Rushen,** 721 F.2d 1193, 1195 (9th Cir. 1983) (prosecution misconduct suggests weakness in prosecution case). These are the predictable absurdities which will ensue if petitioner's position is adopted..

[23] Petitioner's arguments should be addressed to the Congress or the Rules Committee.

[24] Fed. R. Crim Proc. 11(e)(1)(B).

an advisory sentencing matrix.[25] The judge was a check on the sentencing power of the prosecutor. If the judge was arbitrary and excessive, his sentencing decision was subject to further review by the Parole Commission.[26] The judge within a short time after sentence was able to reduce it.[27] The sentence a prisoner would serve was a result of the interaction of the three agencies - prosecutor, judge, and parole authority.

The Department of Justice proffered, and Congress accepted, the limit on the discretion of judges at sentencing and the abolition of parole. Congress had the right to create a Sentencing Commission, narrow the discretion of judges at sentencing, and abolish parole.[28]

[25] Parole Guidelines are similar to Sentencing Guidelines, but not as offense specific. They also considered age at first offense, drug addiction, successful performance on probation or parole, and confinement-free history. USPC Salient Factor Scoresheet.

[26] Generally, all prisoners were eligible to be paroled after completion of one-third of their sentence (18 U.S.C. 4205(a) [repealed]), and the judge could make the prisoner immediately eligible for parole (18 U.S.C. 4205(b)(2) [repealed]).

[27] Prior to the Guidelines, judges were granted a second-look and opportunity to reduce the sentence imposed within 120 days of the finality of the sentence and conviction (Fed. R. Crim. P. 35(b) [repealed]). Now a reduction is permitted only if made on the motion of the Government to reflect "defendant's subsequent, substantial assistance in the investigation of another person." Fed. R. Crim. P. 35(b).

[28] Although parole was abolished, Congress created its functional equivalent named supervised release, which was added to the sentence. If a violation occurs, the defendant answers to the court rather than a parole authority. 18 U.S.C. 3583, 3624(e). Fed. R. Crim. P. 32.1.

Mistretta v. United States, 488 U.S. 361 (1989). Although Congress permitted the Sentencing Commission to consider the defendant's age, education, mental and emotional condition, physical condition, previous employment record, family ties and responsibilities, and community ties,[29] the Sentencing Commission chose to exclude these factors as irrelevant at sentencing.[30] The criteria relevant to federal sentencing today are the nature of the offense (which may be calculated from the amount of contraband, i.e., **Chapman v. United States**, 500 U.S. ___, 111 S.Ct. 1919 (1991), or money involved) and criminal history.[31] The elimination of parole and the substantial curtailment of judicial discretion shifted the sentencing power to the prosecutor, who still retains control of sentencing by the charge filed or the charge to which the defendant will plead guilty.[32] Under the new

[29] 28 U.S.C. 994(d). Prior to the Guidelines, these were the usual factors set forth in the probation officer's presentence report to provide a comprehensive view of the offender, as well as the offense.

[30] These factors are now ordinarily irrelevant at sentencing. Chapter 5H - Specific Offender Characteristics, USSG Manual. Also race, sex, national origin, creed, religion, and socio-economic status are not relevant. §5H1.10. No consideration at sentencing is available for those who of necessity must sleep under the bridges. Also, military, civic, charitable, or public service, employment-related contributions, and similar prior good works are not ordinarily relevant. § 5H1.11.

[31] The Sentencing Commission also lists role in the offense (§ 5H1.7) and dependence upon criminal activity for a livelihood (§ 5H1.9), but the former relates to the offense and the latter to criminal history.

[32] The Sentencing Guidelines do not affect the power of the prosecutor to manipulate the charge to a result he approves. A common example is where a defendant, like respondent, charged with one pound of methamphetamine faces a mandatory minimum

sentencing scheme, the prosecutor is the gatekeeper on sentence reductions below the Guidelines as well as Congressional minimum mandatory sentences. Only one transcendental factor will ameliorate these Procrustean Guidelines and mandatory sentences – Governmental "cooperation": Substantial assistance in the investigation and prosecution of another. 18 U.S.C 3553, U.S.S.G. § 5K1.1, and Fed. R. Crim. P. 35(b).

A competent federal defense lawyer must seek out all options, explore avenues of disposition other than trial, and persuade the prosecutor to make the requisite motion, without which the cooperation is meaningless because the court will not be able to consider it. **Wade v. United States**, 112 S.Ct. 1840 (1992). Given the nature of federal sentencing, defense counsel are forced to seize upon the opportunity for cooperation, even if the client protests his or her innocence. **North Carolina v. Alford**, 400 U.S. 25, 37 (1970). If the lawyer is to serve the best interest of the client, discussion with the prosecutor about sentence is obligatory if there is any chance the defendant will be convicted. The prosecutor knows that the only "break" in mandatory minimum is in "cooperation" and has absolute control over the award of any sentencing departure. The prosecutor knows the defendant and defense counsel must come to him to discuss the case.

Plea Negotiations in Federal Courts

sentence of ten years (21 U.S.C. 841(b)(1)(A)(viii)). With the concurrence of the prosecutor, he could plead guilty to a telephone count (use to facilitate a drug transaction) (21 U.S.C. 843(b)) with a maximum exposure of four years confinement.

Most negotiations, like this case, occur after the prosecutor has filed a complaint or returned an indictment.[33] The defendant is furnished with discovery the prosecutor is willing to part with, for under the law, the prosecutor need not turn over statements of the witness, and then only if they are substantially verbatim and adopted by the witness, until that witness has testified at trial.[34] Defense counsel must contact the prosecutor as soon as possible, for the information his client may have to offer could become stale or useless if already revealed by co-defendants. In attempting a compromise short of formal litigation, the negotiations are often completed before the filing of motions to avoid unnecessary work. Defense counsel is forced, often with only limited discovery and little or no investigation, to explore quickly the range of sentencing options; he is thus handicapped at the outset of negotiations. Prosecutors are reluctant to make a commitment until they have had an opportunity to assess the value of the proffered cooperation. Defense counsel and the prosecutor will usually discuss in advance the nature of the cooperation and the individuals about whom they seek information. It can be either specific persons by name or other participants, i.e., the supplier in this or other instances, buyers, sources, information about other laboratories, transactions wit-

[33] While many "white collar" crime cases are negotiated before charges are filed, the overwhelming majority of plea bargains take place after charges have been filed.

[34] 18 U.S.C. 3600 ("The Jencks Act", so named after **Jencks v. United States**, 353 U.S. 657 (1957) (defense entitled to statements of testifying FBI informants) , which Congress then in 1957 severely restricted to preclude defense discovery of witness' statements prior to their actual testifying); Fed. R. Crim. Proc. 12(i) and 26.2.

nessed, and even hearsay about other law violators.

Once the Government believes the proffer has value, it arranges a scheduled "debriefing" with the agents, either with or without the prosecutor. At this "debriefing" the agents go into great detail searching for every possible fact concerning the activities and identity of the persons they will investigate or prosecute. Sometimes there are follow-up sessions where the agents want clarification or seek additional information or assistance.[35] If a concern exists, the prosecutor or the agents may obtain a sworn statement (i.e., a written statement made under oath, or a deposition before a court reporter) or the prosecutor may take the cooperating defendant before the grand jury to "lock in" his or her testimony against a later change of heart.

The Government generally gives no commitment on the extent of a downward departure,[36] for the prosecutor reserves the right to not only evaluate the nature of the cooperation about others but retains the right to determine its authenticity. After the debriefing(s) and other assistance, the defendant will enter a plea usually pursuant to a written plea agreement. Left until the time of sentencing is the prosecution decision on whether the Government will make a motion for departure or provide any other favorable sentence recommendation.

[35] The agents will often ask the cooperating defendant to testify or work undercover to earn "substantial assistance" for making other cases.

[36] In this case, the agent at the interview suggested a possible sentence or sentence reduction of two years (J.A. 77) without knowing what type of information the respondent would furnish.

Under the Guidelines, the sentencing procedure is protracted, and sentencing will occur not less than eleven weeks after the plea of guilty is entered.[37] In many instances, the prosecutor reserves the right to make the motion for cooperation or substantial assistance and the amount to be credited below the Guidelines or the minimum mandatory sentence.[38] The prosecutor will have substantial time to evaluate the cooperation, and if misled, may withdraw from any commitment to making the motion for a departure for cooperation. If the prosecutor concludes the defendant was untruthful during the debriefing, there are other remedies available other than allowing the inconsistent statements to be used for impeachment when the defendant testifies at trial.[39]

[37] In the Southern District of California, which is typical of other district courts, sentencing is scheduled at least 11 weeks after the plea of guilty is entered or the verdict or finding of guilt are returned. U.S. Dist Ct. So. Dist. Calif. General Order 350, dated 16 Mar 93. See Fed. R. Evid. 201(Judicial Notice).

[38] If the prosecutor makes the motion, the court may go below the level or reduction proposed by the prosecutor. **United States v. Keene**, 933 F.2d 711 (9th Cir. 1991).

[39] **United States v. Gordon**, F.3d , 1994 WL 135383 (11th Cir. No. 93-6207 4 May 94) (defendant's lying during plea agreement exempted Government from making the motion for departure for cooperation). The Government's claim that it needs a sanction for the dishonest "cooperator" (Pet. Brief 27) is greatly overstated. Not only may the Government withdraw from any commitment to move for a reduction of sentence, but may seek an increased sentence for obstruction of justice. § 3C1.1.

Waiver of Congressional Protection of Settlement Discussions in Criminal Cases is a General Public Concern, Rather than a Private Concern, and is Invalid as Contrary to Public Policy.

Not every right may be waived. The Government should not be able to extract from a criminal defendant a waiver of the Constitutional protection against cruel and unusual punishment (Eighth Amendment) or the freedoms of speech or religion (First Amendment), which are fundamental protection of society as a whole rather than limited to the individual holder of the right. The Fourth Amendment right of privacy consists of two components: the individual's expectation of privacy and that which society deems as a reasonable expectation of privacy.[40] The individual may consent to the intrusion of his personal right of privacy, but his action could not control what society deems as reasonable, nor could the individual waive the societal standard of reasonableness so as to make an otherwise unlawful search valid. Also, the primary focus of Fourth Amendment protects the individual from Government intervention, rather than the public generally. Each Amendment, like each statute, must be evaluated on its own to determine the public and private interest protected. The public interest in freedom of religion and speech and freedom from cruel and unusual punishment is of paramount concern, for these rules define who we are as a society. Because of the paramount public interest, a waiver of these rights by an individual would be invalid.

[40] The definition now adopted by the court was formulated by Justice Harlan in his concurring opinion in **Katz v. United States**, 389 U.S. 347, 361 (1967): "[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"

The Government, as well as the dissenting judge below, placed great weight (Pet. Brief 8, 22, 26, 32) on **Town of Newton v. Rumery**, 480 U.S. 386 (1987),[41] in which a knowledgeable defendant in a criminal case after careful deliberation waived his potential civil rights action (42 U.S.C. 1983) in return for the dismissal of the criminal charge. The Court carefully noted this was the surrender of an uncertain civil judgment in return for a guaranteed dismissal of the criminal case. Justice O'Connor noted: "The legitimacy of plea bargaining depends in large measure upon eliminating extraneous considerations from the process. [Citations omitted.] No court would knowingly permit a prosecutor to agree to accept a defendant's plea to a lesser charge in exchange for the defendant's cash payment to the police officers who arrested him." 480 U.S. at 400-401. The waiver agreement was written by the defendant's attorney and considered by him three days before he signed it. 480 U.S. at 394. The Court noted that although this release-agreement did not take place under judicial supervision, plea bargaining generally is subject to judicial supervision which serves to insulate it from prosecutorial abuse. 480 U.S. at 400. Because the majority acknowledged the existence of frivolous civil rights complaints, there may be a public interest favoring release agreements. Justice Powell's opinion made it

[41] Justice Powell wrote the plurality opinion indicating that Congress gave the individual the right under 42 U.S.C. 1983, not the public generally. 480 U.S. at 395. Justice O'Connor wrote the decisive concurring opinion emphasizing the Government had the burden to prove "the agreement is neither involuntary nor the product of an abuse of the criminal process." 480 U.S. at 399. (Emphasis added.)

clear that the resolution affected release of a civil case, and that this was not a criminal case. 480 U.S. at 397 n. 8.

The most obvious difference between **Rumery** and this case is that Congress created an individual right in 42 U.S.C. 1983, but it established a process of settlement negotiations that governed both the Government and all defendants prohibiting the use of statements made during those discussions. The settlement rules apply to both parties, prosecution and defense, and it was primarily to protect the process from abuse that caused Congress to not permit negotiation statements from being used for impeachment.

An apt analogy is the employer-employee relationship concerning the Congressional regulation of that superior-inferior relationship. The Government, even more than the employer, has absolute control over the sentence, and deals with individual defendants one at a time, unlike the employer whose authority can be countered by collective bargaining. The Fair Labor Standards Act of 1938 imposed minimum wages for covered employees and established liquidated damages against employers for violations. In **Brooklyn Savings Bank v. O'Neil**, 324 U.S. 697 (1945), an employee was given a check for $423.16 for overtime and as a release for any claim against the employer bank for liquidated damages. The Court stated the general principle concerning the waiver of rights created by Congress:

> It has been held in this and other courts that a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver contravenes the statutory

policy. 324 U.S. at 704.

That statute recognized the unequal power of the employer and employee (324 U.S. at 706-707), much as the Fed. R. Crim. Proc. 11(e) recognizes the power of the prosecutor in making non-binding (11(e)(1)(B)) or binding sentencing recommendations (11(e)(1)(C)).[42] The Court emphasized the unavailability of waiver:

> Neither the petitioner nor respondent suggests that the right to the basic statutory minimum wage could be waived by any employer subject to the Act. No one can doubt but that to allow waiver of statutory wages would nullify the purposes of the Act . 327 U.S. at 707.

Substitute Government or prosecutor for employer, and settlement negotiations for statutory wages, and the public policy prohibition of waiver of the minimum wage – a protection against the abuse of the unequal bargaining positions of the parties– applies to preclude waiver of rules that further settlement discussions in criminal cases.

The power and superior bargaining position of the prosecutor leads inexorably to the extraction of other unreasonable waivers because of the defendant's compulsion to seek alleviation from the Guidelines or statutory minimums. In this case respondent apparently gave up

[42] Under Fed. R. Crim. Proc. 11(e)(1)(C) the court may reject the sentence agreed to by both parties, but then must permit the defendant to withdraw the plea of guilty. This rarely occurs. The prosecutor may also dismiss charges (11(e)(1)(A)), to which the court usually acquiesces.

his **Kastigar** rights. Thus, even if the privilege against self-incrimination was violated by coercion, the Government precluded any inquiry as to the use or derivative use of the improper statements secured. What is to preclude the prosecutor from demanding from a defendant and the defense lawyer that in order to enter into § 5K1.1 negotiations, the defendant would have to give up the right to trial by jury or any hearsay objection short of a Confrontation Clause violation.[43] The right to trial by jury may be surrendered in open court after a careful examination of the options, which would be subject to judicial scrutiny. The advantage the prosecutor has in controlling the sentence should not be permitted to defeat the policy established by Congress to foster settlement negotiations.

Benefit Without Bargaining: Post-Indictment Interrogation Under Guise of Settlement Is Error.

The nature and conduct of the pretrial interview reveals it was a post-indictment interrogation about the specific offense under the guise of a "proffer" or plea bargain for a lesser sentence. Such interrogation is in violation of the Sixth Amendment right to counsel when defense counsel does not realize that the "settlement

[43] The Government referred to the stipulations agreeing to the waiver of evidentiary rules. (Pet. Brief 17-18). In the trial of a case, there will be many motivations for entering into such stipulations by both sides that ease the trial of the case and focus on the critical issues. The settlement conference, if the Government's theory is correct, could now be used by the prosecutor to secure waivers of the rules of evidence. It is one thing to stipulate on a level playing field, it is another to be forced to surrender every fundamental right to gain the opportunity to plea bargain.

conference" is a post indictment interrogation. **Massiah v. United States**, 377 U.S. 201 (1964); **Brewer v. Williams**, 430 U.S. 387 (1977); **United States v. Henry**, 447 U.S. 264(1980); and **Maine v. Moulton**, 474 U.S. 159 (1985).[44] This Court, summarizing the Sixth Amendment prohibition, stated: "As our recent examination of this Sixth Amendment issue in **Moulton** makes clear, the primary concern of the **Massiah** line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation." While the **Massiah** line of cases dealt with statements made by a defendant in absence of his attorney, the principles are applicable when the attorney is present but is unaware that an interrogation is taking place. Defense counsel and respondent did not waive the right to be free from interrogation, because they did not know the settlement session was a disguised attempt to elicit statements from the accused that could be used against him at trial.

Neither the prosecutor nor the agents sought information about "another person,"[45] but focused instead on the actions and statements of the accused. They

[44] The actions of the police were designed to deliberately elicit incriminating remarks. **Kuhlman v. Wilson**, 477 U.S. 436 (1986). Also, the inquiry was directed toward the offense with which respondent had been charged. **McNeil v. Wisconsin**, 111 S.Ct. 2204 (1991).

[45] The prosecutor stated that reason for respondent coming to their office "was to cooperate with the government and provide information about other traffickers." J.A. 61. Agent Moreland testified that Shuster, the respondent's alleged source of the methamphetamine, was arrested, turned Government informant, and agreed to act as a broker to obtain methamphetamine from the respondent on the day of his and respondent's arrest. R.T. 101-106, 157-161.

accused him of lying, a standard interrogation technique. They confronted respondent with evidence for the sole purpose of eliciting impeaching statements. J.A. 98. They used a ruse of saying his fingerprints were on the glassware to extract admissions from him about the knowledge of the laboratory. J.A. 102-103.

All prosecutors and agents know that statements taken in violation of **Miranda** warnings may be used to impeach a defendant if the defendant testifies at the time of trial. **Oregon v. Haas**, 420 U.S. 714 (1975); **Harris v. New York**, 401 U.S. 222 (1971). The police are not allowed to deliberately refrain from **Miranda** warnings with the planned expectation to use the statements for impeachment. See **Cooper v. Dupnik**, 963 F.2d 1220 (9th Cir. 1992) (en banc). In **Cooper** the police planned to arrest a rape suspect and question him without **Miranda** warnings until they obtained a confession. The officers knew that the confession or admissions would be inadmissible in the prosecutor's case in chief, but they anticipated they would be used for impeachment. The police expected the confession would prevent the defendant from testifying he was innocent or would hinder an insanity defense. 963 F.2d at 1224. The officers knew their plan violated the law. 963 F.2d at 1225. The court found that Cooper's Fifth Amendment privilege against self-incrimination was violated and that the police conduct shocked the conscience and stated a cause of action under 42 U.S.C. 1983. 963 F.2d at 1236-1237.

Public policy, the interplay of the Fifth Amendment privilege against self incrimination, the right to due process and the Sixth Amendment right to counsel preclude the prosecutor from using settlement confer-

ences as post-indictment interrogation sessions to deliberately obtain statements that will be used against the defendant if he testifies or to keep him off the witness stand.

Preclusion of Prosecution's Exploitation of the Inconsistencies Will Not Create a Defendant's "Right to Lie."

Petitioner's characterization of a "defendant's right to lie" is an exaggerated prejudgment about the nature of the inconsistencies in a statement. Many reasons other than lies could explain inconsistencies. Thus, here, the failure of respondent to tell the prosecutor and agents at the settlement interview about his belief that Shuster was a CIA operative engaged in the manufacture of explosives was exploited at trial. J.A. 63, 65. Just because respondent may testify differently than what the agents said he said at the interview is not necessarily a lie. That determination is one for a jury. It is indelible bias and prejudgment to assume every inconsistency is a lie of the defendant and the truth recounting by the agent. There is an even greater evil avoided by Congress' policy exclusion of such "evidence" – the danger that the jury would consider the existence of such "plea bargaining" by a defendant as an admission of guilt.

The Government Failed to Prove That There Was Any Waiver for Impeachment, That It Was Knowingly and Intelligently Made, or That It Was Voluntary.

The Government has the burden to show the waiver was voluntarily made. **Town of Newton v. Rumery**, 480 U.S. 386, 397-398, 399 (1987). Only respondent and the one agent to the interview testified concerning this issue. Respondent, whose testimony

was unchallenged as to his dealings with defense counsel, spent only five minutes with him before the meeting, and had only a vague understanding that the meeting was to reduce his sentence.[46] J.A. 74-75. Prior to the meeting the defense attorney even misinformed respondent that he faced a five-year minimum mandatory sentence, when for a pound of methamphetamine it was ten years.[47] Although the agent testified that the prosecutor told respondent at the start of the meeting:

> . . . if he decided to later take the stand in his defense anything that he might say at this meeting could be used to -- basically for perjury reasons. If he told us one thing at that meeting and later told us another thing and they were contradictory to each other, that that could be brought up in a trial setting.[48] J.A. 97.

The agent then testified by reciting what respondent said. J.A. 97. However, nothing in the agents' trial testimony shows that the respondent either understood these warnings or waived them. The admonishment

[46] During the meeting the respondent testified he consulted once with his attorney (J.A. 66), but the agent testified he consulted twice with his attorney (J.A. 100).

[47] 21 U.S. C. 841(b)(1)(A)(viii) (100 grams or more of methamphetamine is a ten-year minimum mandatory). The agent corrected the respondent's erroneous understanding and advised him he was facing a ten-year minimum mandatory sentence. J.A. 77.

[48] Respondent was also told that if he lied he would be charged with false statements. If he pleaded guilty, he would receive consideration for truthful testimony. He was told of some Kastigar matter of which the agent did not recall the details. J.A. 96-97.

itself by the prosecutor is not a waiver. Respondent had no recall of ground rules of the meeting, a waiver of rights, the authority of the Government to unilaterally determine whether his statements were accurate (and use them against him at trial if they determined that issue adversely) or his right not to speak.[49] J.A. 83. Because the record shows no waiver or affirmative agreement to the conditions of the meeting, this Court has no waiver to assess. Cf., **Boykin v. Alabama,** 395 U.S. 238 (1969) (courts cannot assume from a silent record that a guilty plea had been voluntarily made or that constitutional rights have been freely and intelligently waived).

A knowing and intelligent waiver of rights is fundamental to review of the question presented. Not existing, there is no basis to determine if an otherwise proper waiver of rights may be made in the context of bargain. This petition should be dismissed as having been improvidently granted.

If respondent's policy arguments fail, this Court will have to grapple with the issue of what sort of waiver will allow Government use at trial of a defendant's settlement statements. For example, respondent was not advised of his statutory rights to exclude such statements under Rule 11(e)(6). Should that not be incorporated in any "waiver?" Or that the prosecutor unilaterally determines the truthfulness of the cooperation, and may not only reject it, but use it against the defendant at trial?

Here, both the agent and respondent knew the

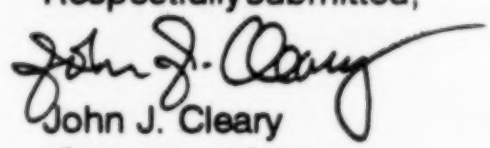
[49] Respondent admitted he was told that he had to be truthful (J.A. 64-65), but his only other understanding of "guidelines" (conditions of the interview) was the Sentencing Guidelines (J.A. 75-76).

interview was a condition precedent to a lesser sentence. J.A. 75. Respondent said that the agent "offered me two years of a reduced sentence for coming in the debriefing if he accepted my answers of what it was that I was supposed to answer of his questions." J.A. 77. He knew the prosecutor had control over the sentence that the judge did not have. J.A. 78-79. The meeting was induced by a conditional promise of leniency, which undermines the voluntariness of the statements. For an action to be "free and voluntary: that is, it must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." **Malloy v. Hogan**, 378 U.S. 1, 7 (1964). Also, unlike an improperly **Mirandized** statement, an involuntary statement cannot be used for impeachment. **Mincey v. Arizona**, 437 U.S. 385, 398 (1978).[50]

CONCLUSION

Because there was no proof of waiver, the petition should be dismissed as improvidently granted. In the alternative, the judgment of the lower court should be affirmed.

Respectfully submitted,



DATED: 30 June 1994

John J. Cleary
Attorney at Law

[50] Use against a defendant of his involuntary statement is a denial of due process of law. Although use of an involuntary confession or statements does not call for automatic reversal (**Arizona v. Fulminante**, 499 U.S. 279 (1991)), the use of the settlement interview statements here could not be harmless beyond a reasonable doubt.